

**Before the  
Federal Communications Commission  
Washington, D. C. 20554**

In the Matter of	)	
Review of the Section 251 Unbundling	)	
Obligations of Incumbent Local Exchange	)	
Carriers	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition	)	
Provisions of the Telecommunications Act of	)	
1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services Offering	)	
Advanced Telecommunications Capability	)	CC Docket No. 98-147

**BELLSOUTH'S REPLY**

BellSouth Telecommunications, Inc., by counsel, replies to the comments filed in response to the *Further Notice of Proposed Rulemaking*.<sup>1</sup>

Beneath the predictable rage of CLEC rhetoric, the fact remains that the Commission's current pick and choose rule has distorted what would otherwise be "normal" contract negotiations. Forbearance, or in the alternative, the availability of an "all or nothing" option instead of the current rule, will provide adequate CLEC protection, particularly in conjunction with existing statutory anti-discrimination and state commission review safeguards.

BellSouth has 496 operational interconnection agreements in place, of which 151 were "adopted" by CLECs under the current pick and choose rule. Of these 151 agreements, 36 were adopted in their entirety, and 115 were adopted with modifications. What these numbers tell us

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<sup>1</sup> *In the Matter of Review of the Section 251 Unbundling Obligation of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, *et al.*, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, FCC 03-36, ¶¶ 713-29 (rel. Aug. 21, 2003) ("*NPRM*").

is that in nearly a third of all cases, BellSouth is not getting the opportunity to negotiate with CLECs because of the CLECs' ability to "opt in" to entire CLEC agreements. On the one hand, this suggests that forbearance from applying 252(i) is necessary because the current pick and choose rule (indeed, an all or nothing variant of that rule) "discourages the sort of give and take negotiations that Congress envisioned."<sup>2</sup> On the other, it suggests that since the majority of interconnecting carriers do negotiate their agreements with BellSouth, the company is not the monopolist bully characterized in CLEC pleadings.<sup>3</sup>

What these numbers do not explicitly show are the problems that arise when CLECs adopt provisions or even entire agreements without full awareness of the intent of the parties who drafted the original agreement, or where the "adopting" party's business plan or particular circumstances do not match those of the CLEC with whom BellSouth negotiated the original agreement. When this happens, and it has happened, problems may arise later when an "adopting" CLEC does not have the resources to implement or comply with an agreement negotiated by a competitor, and the interests of BellSouth's shareholders are harmed as a result.

These numbers also do not explicitly quantify the constraining effect that the pick and choose rule has on CLEC negotiations. Specifically, during CLEC negotiations, the existence of the pick and choose rule chills BellSouth's willingness to enter into custom provisions for fear that such provisions will be adopted by unrelated parties that are not in a position to deliver to BellSouth the benefit it is due from the bargain struck between the parties.

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<sup>2</sup> *Id.*, ¶ 722.

<sup>3</sup> These numbers demonstrate that, in over two-thirds of the cases, carriers either negotiate their own agreements or elect to adopt the standard interconnection agreement that BellSouth posts on its interconnection web site: [www.interconnection.bellsouth.com](http://www.interconnection.bellsouth.com).

The Commission has heard all of these arguments against the pick and choose rule before, and it has heard the economic generalities (monopolist bargaining strength, etc.) that supporters of the rule continue to advocate. About the only thing that has changed since the Commission initially adopted its rule is, in fact, the passage of time. This passage of time, however, is critical.

When the Supreme Court upheld the Commission's rule in the face of the ILECs' legal challenge (although the Supreme Court characterized the ILECs' position as "eminently fair"), the Court noted that "whether the Commission's approach will significantly impede negotiations (by making it impossible for favorable interconnection-service or network-element terms to be traded off against unrelated provisions) is a matter eminently within the expertise of the Commission and eminently beyond our ken."<sup>4</sup> The Commission now observes that, with the passage of time, and actual "experience since 1996, . . . the pick-and-choose rule discourages the sort of give and take negotiations that Congress envisioned."<sup>5</sup>

The Commission is not alone among regulators in this conclusion. The Florida Public Service Commission itself has expressed "misgivings" about the rule.<sup>6</sup> The Florida Commission observes that the current interpretation "significantly reduces competitors' incentives to negotiate," and can, over time "effectively defeat both the need and purpose of negotiation."<sup>7</sup> Indeed, the Florida Commission's observations tend to support BellSouth's own experience that the current rules constrain free and full negotiations. And in demonstration that the Florida

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<sup>4</sup> *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 396 (1999).

<sup>5</sup> *NPRM*, ¶ 722.

<sup>6</sup> Comments of the Florida Public Service Commission on Further Notice of Proposed Rulemaking at 3 (filed Oct. 15, 2003) ("FPSC Comments").

<sup>7</sup> *Id.* at 3-4.

Commission is genuinely concerned with a market-based interpretation of the statute and with fair competition, that body has stressed the specific authority of the Act to require carriers to negotiate in good faith.<sup>8</sup>

Both the New York State Department of Public Service and the Public Utilities Commission of Ohio express similar concerns.<sup>9</sup> Based on its experience since 1996, New York DPS is able to state “applying an all-or-nothing rule to the terms of approved agreements should provide negotiating parties greater latitude to craft creative agreements that might expand the range of available services and options.”<sup>10</sup> The PUC of Ohio observes that the current rule puts each of the companies entering into the original interconnection contract at a competitive disadvantage, and that, in light of this Commission’s new UNE rules, the current pick and choose rules “may be outmoded or in some circumstances unworkable.”<sup>11</sup>

The Supreme Court clearly signaled to this Commission that the Commission’s particular approach under § 252(i) is eminently within the Commission’s expertise. Proponents of the notion that the statute admits of no other interpretation than the current interpretation are simply mistaken. Time and experience, and the record in this proceeding, support a more nuanced and market-oriented approach to the Commission’s rule.

Understandably, CLECs will howl at the notion of forbearance, but forbearance is appropriate in this case. To take BellSouth’s example, the majority of contracts are already negotiated. Without pick and choose (or “all or nothing”), all contracts will be negotiated.

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<sup>8</sup> *Id.* at 7.

<sup>9</sup> Comments of the State of New York Department of Public Service at 2 (filed Oct. 16, 2003) (“New York DPS Comments”); Comments of the Public Utilities Commission of Ohio at 3 (filed Oct. 16, 2003) (“PUC of Ohio Comments”).

<sup>10</sup> New York DPS Comments at 2.

<sup>11</sup> PUC of Ohio Comments at 3.

BellSouth will still make available a standard form interconnection agreement that carriers are free to execute as is, or to negotiate from as they desire, if they desire to minimize their transaction costs. And while they won't necessarily get the benefit of another competitor's unique bargain without negotiating for it, they will have all of the protections of state and federal oversight afforded under §§ 202, 208 and 251 of the Act.<sup>12</sup>

Forbearance also solves the (incorrect) legal argument that this Commission's hands are somehow tied, and that they are prohibited from interpreting a provision of the statute that the Supreme Court has said is "eminently within" its special expertise. Forbearance from the pick and choose rule is responsive to the concerns expressed by the Ohio, New York and Florida state commissions. In short, it is an approach that is worth trying.

As BellSouth explained in its comments, market conditions and statutory safeguards make an SGAT filing and approval requirement an unnecessary regulatory condition precedent to appropriate, market-driven regulatory oversight. Statutory good faith negotiation and non-discrimination obligations, together with current market conditions, justify a new approach that

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<sup>12</sup> LecStar complains about BellSouth's conduct in negotiations. There is an appropriate forum for legitimate complaints, and procedures to develop an accurate record concerning them, but unsupported statements in rulemaking comments are simply out of place. For the record, however, BellSouth agreed to LecStar's proposals in 17 out of the 27 requested modifications. Of the ten remaining issues, this Commission has no way of knowing the reasonableness or unreasonableness of either party's bargaining positions, but LecStar's positions were, in BellSouth's experience and business judgment, unreasonable. In any event, LecStar began by negotiating off of another carrier's agreement, and requested a "restart" due to an internal management change. BellSouth agreed, thus extending LecStar's time to negotiate. LecStar wound up adopting another carrier's nine-state agreement with a few mutually agreeable changes, including the right to adopt rates from another carrier's earlier agreement. All other provisions were mutually negotiated. This experience hardly constitutes grounds to maintain the current rule; indeed it demonstrates that where "pick and choose" is available, CLECs often insist on *further* negotiations to provisions or agreements that they have "picked" or "chosen," thus, rendering the rules essentially meaningless.

will “restore market-based incentives to negotiate” and “protect competitors from discrimination.”<sup>13</sup>

The Commission’s SGAT proposal has come under attack by CLECs in the comment round, although as several state commissions observe, the Commission’s proposal (though not legally required) may be, in practical effect, a good “compromise.”<sup>14</sup> With the new role of SGATs established as in the *NPRM*, these documents would have to be updated regularly and subject to regular state commission scrutiny. Therefore, their role in the interconnection context would change dramatically. However, the availability of an SGAT from which CLECs can pick and choose must not result in the availability of terms and conditions to which they are not entitled under § 252(i). An SGAT must contain “a statement of the terms and conditions that [a Bell operating company] generally offers within that State to comply with the requirements of section 251.”<sup>15</sup> Section 252(i), by its express terms, and according to the Supreme Court, only applies to any “interconnection, service or network element” provided under an approved agreement.<sup>16</sup> Should the Commission choose to adopt its SGAT proposal, either as an interim step or in lieu of forbearance,” the Commission should clarify that CLECs may not “pick and choose” from among the general terms in SGATs that are not “interconnection, service or network element terms.”

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<sup>13</sup> *NPRM*, ¶ 729.

<sup>14</sup> *See, e.g.*, New York DPS Comments at 2.

<sup>15</sup> 47 U.S.C. § 252(f)(1).

<sup>16</sup> 47 U.S.C. § 252(i). *See Iowa Utils. Bd.*, 525 U.S. at 396.

## CONCLUSION

CLEC attacks on the notion of forbearance and the reasonableness of the Commission's tentative conclusions are unwarranted. Forbearance remains the best means of restoring and achieving Congress's goal of meaningful marketplace negotiations. Because states retain oversight, and this Commission retains § 202 enforcement authority, forbearance or, in the alternative, a rule modification that does not discourage negotiation by allowing carriers to elect provisions that are independent of interconnection, service and network element terms, will restore market-based incentives to negotiate and allow competitors to remain protected from discrimination.

Respectfully submitted,

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Date: November 10, 2003

**CERTIFICATE OF SERVICE**

I do hereby certify that I have this 10th day of November 2003 served the parties to this action with a copy of the foregoing **REPLY COMMENTS OF BELL SOUTH** by electronic filing and/or by placing a copy of the same in the United States Mail, addressed to the parties listed on the attached service list.

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